UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY, INC.	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

Respondent, Daisy Manufacturing Company, Inc., ("Daisy"), has filed a motion[1] seeking to have the Complaint dismissed on the grounds of "procedural irregularity" and violation of the "Sunshine in Government Act." Motion at 1. The basis for the motion derives from asserted actions by the former Chairman of the Consumer Product Safety Commission ("CPSC"), Ann Brown. Complaint Counsel filed an opposition to the motion and a memorandum of law in support thereof, asserting that Daisy's Motion is without factual support and consequently that it has failed to meet its burden of proof.

Regarding the procedural irregularity, Daisy relates that a few months before Chairman Brown resigned she identified five items of "unfinished business" that she wanted to address before her departure. One of the items, as identified in her August 8, 2001 letter, announcing her November 1, 2001 resignation, was "A major recall (or lawsuit regarding) a very dangerous product that kills and maims children." Respondent maintains it was an "open secret" that

---

[1]Respondent also submitted a memorandum of law in support of its motion to dismiss the complaint. ("R's Memorandum") Both documents were duly considered by the Court.

Chairman Brown was referring to certain models of the Daisy Powerline air guns, which guns are the subject of this litigation. Motion at 2. Thereafter, in reaction to that remark, Daisy, through counsel, wrote to the Chairman requesting her recusal in the Daisy matter on the ground that her statement displayed prejudgment.[2]

Daisy also wrote to Commissioner Moore, asking that the date for the Commission's vote on the Daisy matter be delayed until after Chairman Brown's resignation became effective. Respondent further relates that, with each of the other items of unfinished business attended to, only the Daisy matter remained on the Chairman's list. The vote on Daisy, which occurred on October 30, 2001, resulted in the issuance of a complaint, with Chairman Brown and Commissioner Moore voting in favor, and with Commissioner Gall voting against issuing a complaint.

Respondent also asserts that the Commission, through its staff and under the direction of former Chairman Brown, violated Section 6(b)(5)[3] of the Consumer Product Safety Act, ("Act"), by informing the press that a complaint against Daisy would issue a day before the complaint was issued. Commissioner Gall, in voting against the complaint, took note of the pre-vote "draft Complaint" press release. Respondent notes that this section prohibits Commission disclosure of any information "submitted pursuant to Section 15(b)" until a Complaint has been issued. Respondent also points to an advance press "briefing" prepared for the Chairman and an advance "press release" on the Daisy matter both of which were developed in the week before the Complaint. As further evidence that the Complaint's issuance was only a formality, Respondent notes that a young boy who allegedly had been injured using one of the Daisy air guns and his attorneys were invited to the press conference *before* the vote on the Complaint. Thus, Respondent concludes, the Chairman and CPSC staff knew in advance the Complaint would be issued.

These actions lead the Respondent to its second basis for assailing the legitimacy of the Complaint. Respondent asserts that, as Section 552b(b) of the Sunshine Act requires every

---

[2]The Commission, through its General Counsel, advised Daisy that Chairman Brown would not recuse herself. In its Memorandum in Support, Daisy elaborates upon its reasons for this disqualification, citing *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754 (D.C. Cir. 1964) ("*Texaco*"), *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, ("*Cinderella*")and *Association of National Advertisers, Inc., et al. v. Federal Trade Commission, et al.*, 627 F. 2d 1151, ("*Assoc. Nat. Advs.*") for the proposition that a commissioner's prejudgment of a violation amounts to a denial of due process

[3]This section, 5 U.S.C. § 552b(b), provides: "Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation." Subsection (c) then provides that the second sentence of 552b(b) does not apply in ten separate situations.

portion of every meeting of an agency be open to the public.[4] Commissioners Brown and Moore violated that requirement by meeting without public notice and determining that they would vote to issue the complaint against Daisy. A "meeting" Daisy asserts, refers to "deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business." Motion at 6, quoting 5 U.S.C. § 552 b(a)(2)[5]. Contrary to the requirement of Section 552b(e)(1), requiring a public announcement a week in advance of a meeting, Daisy asserts that two commissioners met before October 30th and it was predetermined then to issue the complaint .

More generally, Respondent asserts that, by violating Section 6(b)5 of the Consumer Product Safety Act and Section 552(b) of the Sunshine Act, the Commission necessarily violated Daisy's due process rights under the Fifth Amendment to the United States Constitution. Specifically, regarding this Constitutional claim, Respondent argues that the due process protection applies not simply to a fair adjudication of the complaint, but to its issuance.[6] As alluded to, the

---

[4]As noted at footnote 3, this is not correct because the section lists ten exceptions to the general rule.

[5]Daisy does not accurately quote the cited section. It actually provides: "the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency *where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e);*" (italics added)

[6]Complaint Counsel submits that *Withrow et al v. Larkin*, 421 U.S. 35 (1975) ("*Withrow*") and *Hercules, Inc. v. EPA*, 598 F.2d 91 (1978) ("*Hercules*"), cases cited by Daisy, do not apply because the decisionmakers there were not held to have acted so as to violate the due process clause. In the Court's view, *Withrow* does not bolster Daisy's position. In rejecting the claim that there was a denial of procedural due process where a state examining board ruled on the merits of the same charges it had investigated, the Supreme Court, while affirming that a fair *trial* is a basic requirement of due process and that "a biased decisionmaker is constitutionally unacceptable," also affirmed that the combination of investigative and adjudicative functions is a very different consideration which carries a "difficult burden of persuasion" to show an "unconstitutional risk of bias." *Withrow* at 1464. The Supreme Court's reference in that decision to an FTC case in which some members of that Commission expressed their opinion, *prior to the filing of the complaint*, that a pricing system employed by respondents was illegal, is instructive here. The Court rejected the argument that bias was demonstrated because it was not shown that the Commissioners' minds had become irrevocably closed. Presciently, the Court emphasized the importance of the hearing that would ensue, where the respondents would have the opportunity to produce volumes of evidence and provide testimony, employ cross-examination and make arguments regarding their view of the permissibility of the practices under scrutiny. Such a hearing is exactly what will occur here. The Court also observed that, even in Article III court proceedings, there are many contexts in which judges sit

foundation for this objection is Daisy's assertion that former Chairman Brown reached her decision to vote for a recall on the Daisy air guns *before* considering the evidence. Complaint Counsel, referring, in this regard, to Daisy's citation to *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C.Cir. 1962) ("*Treat*") and *In the Matters of Murchison*, 349 U.S. 133 (1955) ("*Murchison*"), asserts that those cases are inapposite, as they concerned a melding of investigatory and adjudicative roles. It points out that, in the Daisy matter, Commission staff investigators were not the Commissioners themselves. The Court agrees that *Treat* is inapplicable. There, an individual after participating in both informal and formal prosecution steps, later became a member of that Commission's tribunal. Thus the investigative and prosecuting arms of the agency were not kept separate, a situation running afoul of the fundamental requirement that one who participates in a case for a party may not subsequently participate in the decision. Obviously, even assuming for the sake of argument that Chairman Brown did engage in improper activity, as she is no longer with the Commission, *Treat* is distinguishable. For the same reasons *Murchison*, which involved the *same* judge who sat as a state's 'judge-grand jury' producing contempt charges and then presided at that contempt hearing, is not instructive.

Citing to cases that refer to a fair trial and a fair adjudication, to support the argument that fairness also applies to the issuance of the complaint, Daisy refers the Court to the Administrative Procedure Act, Section 706, entitled "Scope of Review." 5 U.S.C. § 706. This

---

in a case after they have expressed preliminary views of whether certain conduct is prohibited. Speaking to the administrative adjudicatory context, the Court noted that the agency, and members of the body comprising the agency, are exempted from the general proscription of 5 U.S.C.§ 554(d) of the Administrative Procedure Act, which bars employees engaging in the investigation or prosecution function from then participating in the adjudication. It also distinguished *Murchison*, pointing out that case never barred members of an agency, upon first investigating and instituting proceedings, from then adjudicating. In fact the court noted that it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges ... and then to participate in the ensuing hearings." *Id.* at 56. Thus, only in a setting where the initial view of the case "foreclosed fair and effective consideration at the subsequent adversary hearing leading to [an] ultimate decision," would a due process claim be presented. *Id.* at 58. Further, *Hercules*, addressing a challenge to an agency's rulemaking, plainly is inapplicable, offering, as a contrast, only tangential dicta regarding adjudicatory strictures. Complaint Counsel further asserts that Respondent's reference to *McCart v. U.S.*, 395 U.S. 185 (1969), presented to support Daisy's claim that the prejudgment issue should be decided now, is misplaced because Daisy is a civil, not criminal, matter. While it is true that the Supreme Court reversed the federal district court's holding that the defendant could not raise a defense to failing to report for military induction because he failed to exhaust his administrative remedies, this Court does not view the case as persuasive in this context. This is because the Supreme Court, mindful of the concern that there not be litigious interruption of the administrative process, noted that process *had ended* for McKart. The Court also endorsed the proposition that "...courts ordinarily should not interfere with an agency until it has completed its action ..." *McKart* at 194.

section, it urges, applies to the review of the agency conduct alleged to have occurred here. Complaint Counsel notes, however, that Section 706, and Daisy's citation to *Forester v. Consumer Product Safety Commission*, 559 F.2d 774 (D.C. Cir. 1977), pertain to final agency action in a *rulemaking* proceeding.[7]

Daisy also focuses upon its assertion that, through the alleged conduct of Chairman Brown and the alleged complicity of Commissioner Moore, the Commission violated the Government in the Sunshine Act. Constituting a quorum, these two commissioners assertedly violated that Act by doing "more than merely expos[ing] their views to each other." R's Memorandum at 4. Rather, Daisy deduces that "the actual outcome of the vote" had to be known to Chairman Brown because there is no other explanation for the pre-scheduled press conference and the other steps taken in advance of the formal Commission vote. While Daisy acknowledges that the Sunshine Act does not prevent agency members from having informal background discussions for the purpose of clarifying issues and sharing viewpoints, it maintains that the Commissioners' conversations[8] crossed that line by predetermining their official action. Daisy points to *FCC v. ITT World Communications, Inc.* 466 U.S. 463, 471, ("*ITT World*") and *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 216 F.3d 1180, 1189, (*Natural Resources*)[9] in noting that the Sunshine Act requires public meetings where members' discussions become "sufficiently focused on discrete proposals or issues ... [to] be likely to cause the individual participating members to form reasonably firm positions regarding matters ... likely to arise before the agency." R's Memorandum at 5. That such prohibited discussions must have occurred is evident, Daisy maintains, when the following actions taken in advance of the meeting on the official vote are considered: 1. the preparation of press releases and talking points; 2. the

---

[7]*Forester* involved a challenge to CPSC's rulemaking, dealing with bicycle safety, and virtually all of the decision dealt with the particulars of the promulgated regulations. Thus, *Forester* is not useful here.

[8]Although, from the forcefulness of Daisy's arguments, one might assume otherwise, there is no record of any conversation between Commissioners Brown and Moore. Rather, Daisy's claim is built upon the deduction it reaches by evaluating the planning and events which occurred prior to the meeting on the vote.

[9]*Natural Resources*, decided in the wake of the Supreme Court's decision in *ITT World*, concerned the D.C. Circuit's revisiting its construction of the Sunshine Act in light of that decision. Under review was a challenge to the Nuclear Regulatory Commission's promulgation of a regulation defining the term "meeting" under the Sunshine Act. In upholding the NRC's regulation, the Court of Appeals, quoting from the Supreme Court's decision, noted that a " 'meeting' 'contemplates discussions that effectively predetermine official actions.' " Consequently, the NRC's definition, through the Supreme Court's interpretation in *ITT World*, became one and the same with the Sunshine Act. 216 F.3d 1180, 1186, 1189.

release of the Complaint to a newspaper reporter;[10] 3. the invitation of an injured boy's mother and that family's lawyers; 4. the preparing of a press conference room to show videos of the injured boy and for journalists a week before the formal vote. *Id.* at 5.

Referring to *ITT World*, Complaint Counsel notes that the Supreme Court determined that the conduct complained of was not found to be a meeting under the Sunshine Act.[11] It also points out that the issue of whether discussions were sufficiently focused on discrete proposals does not get reached where there is no evidence, in the first place, that a meeting even occurred. Complaint Counsel Memorandum at 7. Further, it contends that, under 5 U.S.C. § 552b(h)(1), Daisy's claim had to be brought in federal district court within sixty days of the offending meeting. Thus, in Complaint Counsel's view, not only is the claim untimely, it has been brought in the wrong forum.

Daisy concedes that a complaint of a violation based solely on Section 552b(h)(1) limits the remedial power of a district court, but it submits that courts reviewing an agency's action on some other statutory basis have broader remedial power when dealing with Sunshine Act violations. It locates such power in the next section of that Act, Section 552b(h)(2). Daisy submits that by explicitly denying a Federal Court the power to set aside, enjoin, or invalidate an agency action when its jurisdiction rests *solely* on Section 552b(h)(1), the very same powers exist when the court's jurisdiction stems from Section 552b(h)(2), which grants it the authority to "afford such relief as it deems appropriate."[12] *Id.* at 6. In this connection Daisy cites *National Assoc. of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982) ("*Copyright Royalty*") as an example of a court's power to partially invalidate agency action where there has been a violation of the open meeting rule of the Sunshine Act.[13] Complaint

---

[10]Complaint Counsel strongly denies that it or any staff person leaked the draft complaint to the news media. Daisy's source for this claim is a reporter for *USA Today*. However Complaint Counsel relates that, as part of an internal investigation of this claim, it contacted that reporter and that the individual stated unequivocally that no CPSC person was the source. In fact, Complaint Counsel suggests that as the proposed Complaint was shared only with Daisy, it is possible that the leak may have flowed from Respondent.

[11]The Court agrees that *ITT World* does not aid Daisy.

[12]Daisy also looks to the legislative history for support of its position that a court may set aside agency action taken in violation of the Sunshine Act. For example, it notes that Conference Report 94-1441, 94th Cong., 2nd Sess. (1976), in explaining subsection (h)(2), stated that where a federal court is otherwise authorized to review agency action, it may afford such relief as appropriate and that such relief, in situations where the violation is serious, intentional and prejudicial, can include setting aside an agency's action. R's Memorandum at 8 -10.

[13]Daisy also cites *ITT World Communications v. FTC*, 699 F.2d 1219, 1246 (D.C. Cir. 1983) as a second example of court invalidation of agency action for violation of the open

Counsel believes that *Copyright Royalty* is distinguishable on the facts and also notes that the federal court's involvement began after there had been an award of funds, a point it makes to reiterate that these challenges first must await final agency action.[14]

Daisy also urges this Court to distinguish the holdings in *Pan American World Airways, Inc. v. Civil Aeronautics Board*, 684 F.2d 31 (D.C. Cir. 1982)[15] and *Braniff Master Executive Council of the Air Line Pilots Association Int'l. v. Civil Aeronautics Board*, 693 F.2d 220 (D.C. Cir. 1982),where the Court of Appeals did not invalidate an agency's action in the face of a violation of the open meeting rule, holding that under Section 552b(h)(2) a release of transcripts, not invalidation of an agency's substantive action, is the normal remedy for Sunshine Act violations. By releasing the transcripts, the prejudice to the airlines resulting from the improperly closed meetings was cured, as the airlines, armed with the transcripts, would be able to challenge the CAB's action. Unlike those cases, Daisy asserts that none of the ameliorating factors exist here, as there is no transcript of the Commissioner's meeting, their improper meeting was intentional, no third parties would be harmed by invalidating the Complaint and because the Commission's decision to issue a complaint was unreasonable.

---

meeting rule, but it concedes that the Supreme Court reversed that decision in *FCC v. ITT World Communications*, 466 U.S. 463, (1984) on the basis that the decision in issue was not a "meeting" under the Sunshine Act. The D.C. Circuit had found that certain consultative process exchanges were meetings but the Supreme Court noted that the questioned discussions served only to provide general background information for the commissioners, which enabled them to engage in an exchange of views. The limited value of this case stems from its dicta which notes that, while meetings with a quorum of an agency's members who conduct or dispose of agency business are covered, the Sunshine Act was never intended to reach informal background discussions that clarify issues or expose different views. Consequently preliminary discussions among agency members are not within its ambit. 466 U.S. at 469 -470.

[14] The D.C. Circuit's remand, noting that the agency had reversed its original decision but that there was no record to explain how the change came about, did remand the matter on Sunshine Act and APA grounds but, in the Court's view, *Copyright Royalty*, as it involved final agency action, is not availing to Daisy. Further, unlike this case, in *Copyright Royalty* there is no suggestion that the court would get involved in looking behind the agency's determination. Rather, the concern was that there was no record at all to reflect how the agency arrived at its reconsidered view.

[15]Complaint Counsel points out that the Appeals Court did not invalidate a Civil Aeronautics Board award of a flight route even in the face of a Sunshine Act violation. Rather, it held that the release of the meeting transcript was sufficient under circumstances where the violation was unintentional and innocent third parties would be harmed if the award were vacated. It emphasizes that the facts in Daisy are more compelling as there is no evidence that there was a secret meeting.

Pointing to Commissioner Gall's October 30, 2001 statement in opposition to the Complaint's issuance, asserting procedural irregularities stemming from the August 2001 retirement remarks by Chairman Brown, which were made well before the Commission received its briefing package and indicating to that Commissioner that this revealed a 'Sentence first, verdict afterwards' approach by the Chairman, Daisy maintains that the decision in *Association of National Advertisers, Inc.* is important because it speaks to the standard for disqualification of an administrative agency chair in rulemaking. From that case, Daisy identifies the standard as "clear and convincing evidence of an 'unalterably closed mind' on matters critical to the disposition of the proceeding." It believes that each of these elements have been well established here. R's Memorandum at 13. Moreover, Daisy asserts that *Association of National Advertisers, Inc.* stands for the proposition that the exhaustion of remedies doctrine is not a barrier to immediate review where the issue involves prejudgment by an agency chair. Looking to *Federal Trade Commission v. Texaco*, 381 U.S. 739 (1965), *WKAT Inc. v. Federal Communications Commission*, 258 F.2d 418 (1958), and *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583 (D.C.Cir. 1970), Daisy asserts these cases hold that the remedy for the Chairman's bias and prejudgment is a remand for the Commission to reconsider issuance of the Complaint.

Addressing Daisy's argument that the Chairman should have disqualified herself, Complaint Counsel first notes that under the CPSC's regulations the Chairman is not a presiding officer. 16 C.F.R. §1025.42. Further, it dismisses the cases cited by Daisy, *Texaco, Cinderella* and *Nat. Advs*, because they involved adjudicative or rulemaking proceedings, and because the Commission's vote to issue the Complaint, being a pre-adjudicative matter, was neither.[16] The Court agrees with Complaint Counsel that *Cinderella* presented a very different situation from that *alleged* here. In fact, the D.C. Circuit drew a distinction between pre-hearing comments and those made after the hearing and while an appeal is pending. It noted "[t]here is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has 'reason to believe' that there have been violations, and statements by a Commissioner *after an appeal has been filed* which give the appearance that he has already prejudged the case and that the ultimate determination on the merits will move in predestined grooves. While these two situations – Commission press releases and a Commissioner's pre-decision public statements – are similar in appearance, they are obviously of a different order of merit." *Cinderella* at 590 (emphasis added). Daisy presents similar distinctions: the hearing has not yet occurred and Chairman Brown, having left the Commission, can have no role in any appeal which may ensue.

Explaining the process leading to the formal vote, Complaint Counsel relates that CPSC staff had been investigating Daisy Airguns for many months before October 30, 2001. During this

---

[16]Complaint Counsel also contends there are other noteworthy distinctions between those cases and the Daisy matter. It submits that the Chairman's actions, nonspecifically identifying a particular respondent and preparing for a press conference are of a different order than the specific references made by the FTC Chairman.

period, the staff, through monthly status briefings, advised the Commission of the status of the Daisy investigation as well as the status of other investigations of products. When settlement talks failed and the CPSC staff decided to recommend that the matter be referred to an administrative law judge for a hearing, it presented a comprehensive memorandum for the Commission on October 4, 2001 and briefed that body on October 23rd. During this briefing the staff answered questions from the Commissioners. Prior to the meeting to vote on the matter, CPSC staff delivered a copy of the proposed complaint to counsel for Daisy. Complaint Counsel also relates that Daisy met with each of the Commissioners' Offices to present its view on the matter and thereafter, by telephone and letter, communicated further with each Commissioner's Office. Complaint Counsel also asserts that Daisy contacted Congress, urged interest groups to weigh in on the matter, and spoke with the news media regarding the upcoming Commission vote. Thus, the formal vote represents the end, not the start, of the process in deciding the vote on a complaint's issuance.

Complaint Counsel acknowledges that former Chairman Brown did schedule a press conference to express her views on the matter, but it declares that the press conference was not dependent on the outcome of the vote. Rather than evidencing a sinister intent, Complaint Counsel asserts that this scheduling merely was reflective of the "real world" need to give the press advance notice of a conference. Consistent with its routine practice, Commissioners prepare statements in advance of such events. However, these advance notices only advise the press that the conference will deal with "an important safety matter" after the vote, but neither the company nor product is revealed at that time. Importantly, Complaint Counsel declares that the CPSC staff, while prepared in the event its recommendation was accepted by the Commission, did not know the vote outcome until the October 30th Commission meeting. Complaint Counsel Memorandum at 5.

Complaint Counsel notes that the critical allegation in Daisy's Motion is that Commissioners Brown and Moore had an improper, secret, meeting at which they decided to authorize the Complaint in this case. However, it points out that even Daisy can do no more than assert that there was an *apparent* meeting, a supposition resting on pre-arranged press conference and the other items it listed in its motion. It contends that Daisy's conclusion infers that "no two people could come to the same conclusion — to authorize a Complaint ... without holding 'improper meetings' first." *Id.* at 6. It also asserts that, in the context of the manner in which issues come before the Commission, it is natural for Commissioners to prepare for the possible outcomes at the time of a vote. Perhaps most importantly, Complaint Counsel denies that such a meeting ever occurred, emphasizing that Daisy has provided no proof that it did.[17]

---

[17]Complaint Counsel also argues, assuming arguendo that Daisy's claims were supported, the claimed offense still would not amount to prejudgment because the Commission did not decide that Daisy's product violates the law. Rather, its vote only authorized the administrative trial to go forward with no true decision being made by the Commission until after the Presiding Officer issues the initial decision. As Chairman Brown is no longer with the Commission, she will never play a role in such a review of the initial decision. CC Opp. at 7-9.

Further, Complaint Counsel asserts that Daisy's claim is barred procedurally as well. Pointing to 5 U.S.C. § 552(b)(d)(1), it claims that asserted violations of the Government in the Sunshine Act require that the matter be raised before the federal district court within 60 days of such a meeting. It also maintains that the exhaustion of remedies doctrine requires that, under the Administrative Procedure Act, challenges to agency action must wait until the agency action has been concluded,[18] which in this instance means at a point after a party has filed for reconsideration of a Final Decision and Order by the Commission, as set forth at 16 C.F.R. § 1025.56.

CONCLUSION[19]

Although one reading Daisy's arguments might lose sight of the fact, it is important to note at the outset that there is no record of any meeting between Chairman Brown and Commissioner Moore nor any direct evidence that those members met and decided in concert how they would vote on the Daisy matter.

A central claim to Daisy's Motion to Dismiss is that "Chairman Brown reached a decision to recall before considering the evidence and obviously met and conferred with another commissioner so that she knew, in advance of the actual vote, how another commissioner would vote." R's Memorandum at 1. This claim jejunely assumes that Commissioners no nothing about a case in advance of the day a formal vote on whether to issue a complaint is taken. It also presumes a Commissioner's clairvoyance by claiming that, by discussing a case beforehand, one Commissioner *would know absolutely* how another Commissioner would ultimately vote.

Nor does the Court accept Daisy's premise that the preparation of a press release, the invitation for an injured boy or the boy's attorneys, or the other indicia Daisy points to, demonstrates that an improper meeting had to have occurred between Commissioners. For example, had the vote gone the other way and the decision was not to issue the complaint, it

---

[18]In this regard Complaint Counsel cites *Grucon Corporation v. CPSC*, No. 01-C-157, slip op. (E.D.Wis. Sept. 19, 2001), *Reliable Automatic Sprinkler Co., Inc. v. CPSC*, 173 F. Supp.2d 41 (D.C.Cir. 2001)("*Reliable*") and *FTC v. Standard Oil of California*, 449 U.S. 232 (1980) ("*Standard Oil*").

[19]Although this Order addresses the merits of Daisy's Motion, the Court has reservations about its authority to look behind the Commission's issuance of a complaint. This concern stems from the provision in Section 15 of the CPSA referencing the right to a hearing in accordance with Section 554 of title 5 of the United States Code. In the context of these provisions, it would seem that the hearing envisioned by that section of the CPSA contemplates a proceeding dealing with the merits of the complaint and a determination whether the government established its claim by a preponderance of the evidence. Thus, apart from a challenge to the Complaint asserting that no vote was actually taken or that the vote was not in favor of issuing the complaint, the Court doubts its authority to look behind the process which resulted in the vote.

would not be hard to contemplate those invited from expressing their dismay or outrage at the vote outcome.

Assuming for the sake of argument that it had been shown that a meeting in violation of the Sunshine Act had occurred, that the time for acting on that allegation had not passed, and that the source for relief was not limited to that Act,[20] the Court believes that the *Standard Oil* decision provides strong authority for the proposition that the issue would not be judicially reviewable until after the conclusion of the administrative adjudication because there has been no final agency action. Presenting a strikingly similar issue, that case determined that the issuance of a complaint by the Federal Trade Commission did not constitute final agency action and consequently judicial review was not available. As in this litigation, the respondent there alleged that the FTC had issued the complaint without having reason to believe that a violation had occurred and therefore that its issuance had been unlawful. Like Daisy, the respondent in *Standard Oil* drew inferences from certain events which preceded the complaint's issuance, and argued that only one conclusion could be reached from them. Eschewing the inefficient consequence of allowing piecemeal review of the agency process and the result of turning the prosecutor into a defendant at the outset of the litigation, the Court was unequivocal in its holding that the issuance of the complaint, as it did not represent "final agency action," was not judicially reviewable until after the administrative adjudication was completed.[21] 449 U.S. 494-496.

The Supreme Court's concern that failure to adhere to the "final agency action" requirement as a prerequisite for judicial review would transform the respondent into a prosecutor was echoed by the D.C. Circuit in *Reliable*. There, Reliable Sprinkler took the offensive, seeking a declaratory judgment that its product was not a "consumer product" under the CPSA. The Court of Appeals, taking note of *Standard Oil*, held that as the issuance of an administrative complaint does not constitute final agency action, investigatory steps which precede that are obviously not

---

[20]While it has already been made clear in the body this Order, formally, the Court does not accept any of these assumptions.

[21]Interestingly, Justice Stevens, in a concurring opinion, would go further, suggesting that Congress did not intend to authorize judicial review at all on the decision to issue a complaint because that action has no effect on a respondent's rights and therefore is not "agency action" within the contemplation of Section 10(b) of the Administrative Procedure Act. The Court believes Justice Stevens' inclination is wise. To allow a Respondent or some interested group to look behind the process preceding the formal vote on the grounds that a commissioner had a closed mind prior to the formal vote, would be an invitation to distracting collateral litigation. Taking that path could would allow a public interest group, unhappy over an unfavorable vote on a proposed complaint, to challenge the legitimacy of a Commission vote. Here, for example, had the vote been to deny issuance of a complaint, such a group could assert that Commissioner Gall's statement, issued the same day as the Complaint, was prepared in advance and thus indicative of a closed mind or prejudgment, in advance of the formal presentation.

reviewable either.

Thus, for the reasons articulated, each of which constitute independent grounds for the decision in this Order, Respondent Daisy's Motion to Dismiss is DENIED.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated:

May 7, 2002

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is my Order, which was also sent via facsimile to you this date. Please transmit this Order via facsimile and regular mail to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure